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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 547

NORTHWEST ENGINEERING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 376 F. 2d 770. The Board's Decision and Order (R. 207-221B, 161-205)[1] and its Supplemental Decision and Order (R. 259-268, 221-258B)

[1] "R." refers to the portions of the record printed as a joint appendix in the court below.

are reported at 148 NLRB 1136 and 158 NLRB 624, respectively.

JURISDICTION

The decree of the court of appeals was entered on June 3, 1967 (Pet. App. 7-8). The petition for a writ of certiorari was filed on August 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Board found that, after the union obtained cards from a majority of the employees authorizing it to represent them, the employer engaged in numerous acts of restraint and coercion violative of Section 8(a)(1) of the National Labor Relations Act, which dissipated the union's majority and destroyed the conditions for holding a fair election. The questions presented are:

1. Whether, in these circumstances, the Board properly exercised its remedial authority in ordering the employer to bargain with the union without first requiring the latter to demonstrate its majority support in a Board election.

2. Whether substantial evidence supports the Board's conclusion that the union represented a majority of the employees prior to the employer's unfair labor practice.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519 (29 U.S.C. 151 *et seq.*), are set forth in the Appendix (pp. 8-9) to the petition. Sections 8(a)(1) (29 U.S.C. 158(a)(1)) and 10(e) (29 U.S.C. 160(e)) of the Act are also relevant here.

Section 8(a)(1) provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7] * * *.

Sec. 10(e), in pertinent part, provides:

> (e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

STATEMENT

A. The Board's Findings of Fact

1. In February 1963, the Union [2] began an organizing campaign among the more than 700 production and maintenance workers at the Company's Green Bay, Wisconsin, shovel and crane plant (R. 224, 163, 260; 59, 148). By March 7, over 400 of the employees had signed cards applying for membership in the

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[2] "Union" refers to United Steelworkers of America, AFL-CIO, which filed the underlying charge in the Board proceeding and intervened before the court of appeals, and is thus a respondent here, along with the Board.

Union, and authorizing it to act as their bargaining agent and "to enter into contracts with my employer" containing union shop provisions (R. 93-94, 132).[3] On that date, the Union submitted some 424 signed authorization cards to the Board's Regional Office, together with a petition for a Board election (R. 93-94, 103-104, 132-145).[4] The same day, the Union sent a letter to the Company asserting that it represented a majority of the employees and requesting a meeting to begin negotiations toward a collective bargaining agreement (R. 104, 146). On March 12, the Company wrote in reply that it would "recognize in collective bargaining only the agency, if any, duly certified to us" by the Board (R. 104, 147).

2. Late in 1962, the Company began working on improvements in its group health insurance plan, and at about the same time the employees, independently, began circulating among themselves petitions directed toward obtaining a more satisfactory plan (R. 208, 209; 87, 17-18). On January 12, Company Vice-President Libert arranged a meeting with employee representatives to discuss insurance coverage and costs (R. 208; 17-18, 25-26). The Company made no mention of the investigation it had already begun,

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[3] A copy of the Union authorization card is reproduced in its entirety at pp. 6-7 of the petition.

[4] By the end of March, according to the Union, an additional 200 employees had signed authorization cards. Fifty of these cards, together with the 424 which had earlier been sent to the Board, were ultimately introduced in evidence in the Board proceeding; the other cards apparently were lost in the interim (R. 94-95, 105.)

and the meeting ended with a statement by President Alan Houston that management would "look into" the matter and that the men "would hear from us" (R. 208; 18-19, 60-61). When the employees present "walked out of the meeting [they] didn't know whether [they would] hear about it again" (R. 27). On March 14, a week after the Union had petitioned for a Board election and had also informed the Company that it represented a majority of the employees, the Company called another meeting, for March 16 (R. 208; 19). By this time, the Company had made its final decision in regard to the coverage of the new plan (R. 209; 86, 83-85). However, at that meeting, the Company did not present its plan, did not indicate that it had already decided upon a plan, and did not proffer any information or proposals (R. 209; 22). Rather, there was merely a general discussion, and one member of the employee group submitted a neighboring plant's insurance plan (R. 209; 19-21, 26-27, 80).

On April 11, the Board's Regional Director directed an election, thereafter scheduled to be held on May 8 (R. 207, n. 2). On April 20, the Company suddenly called the employee committee together and announced its new, substantially improved insurance plan (R. 209; 21-23).[5] This plan, President Houston explained, would, if approved by the employees, go

[5] The monthly cost to the Company for insurance for each employee (for whom the Company paid the premium in full) increased from $4.85 under the old plan to $8.40 under the new plan (R. 46-47). The Company contribution to dependents' insurance went up from $1.94 to $2.80 (*ibid.*).

into effect on May 1, upon expiration of the old plan (R. 209; 23, 80-81).

Two days after the Company announced its new health insurance program, Vice-President Libert initiated two meetings with groups of employees in order to inquire into and discuss grievances of the men in the plant (R. 212; 6-7, 8, 10, 76). Libert asked each foreman to select one or two men from his department, so as to obtain "a cross section" and thereby "get more gripes"; and the men thus selected were called to the "foremen's room" next to Libert's office, and urged by Libert to state their grievances (R. 210; 8, 9, 13-14, 15, 16). The men expressed their dissatisfaction over such matters as pay rates, hours of work, overtime assignments, unavailability of parts that could affect earnings, assignment of employees outside their proper job classifications, and other personnel practices (R. 210; 9-10, 11). On April 30, Libert called a combined meeting of the two groups of employees, described how he had already remedied several of the complaints, and reported that he was "working or looking into the rest" (R. 211; 10-11, 14).

During the same two weeks in which Libert held these grievance sessions, the Company provided its stockroom employees with their first Saturday overtime work since October 1962 (R. 48, 50). Thus, on the two Saturdays immediately preceding the Board election, the Company paid time and a half to some 26 stockroom employees, most of whom were assigned to custodial work rather than their regular duties (R. 212; 29-32, 48). Some of the men washed win-

dows, a job that they had not done in the previous five or six years (R. 213; 50, 48). By the end of the second Saturday, only half of the windows had been washed (R. 213; 49). The Company did not schedule any Saturday work thereafter; the rest of the windows were still unwashed at the time of the Board hearing six months later (R. 213; 49, 48, 29).

On May 7, the eve of the election, L. E. Houston, Chairman of the Board of the Company, made a speech to the employees and their wives—the day shift and night shift separately—in a Green Bay theater that he had rented for the purpose (R. 214; 6-7). At the outset, Houston expressed confidence that what he was about to say would "confirm" what management was "sure" was the employees' "willing-[ness] to discuss either individually or through committees with the management" such matters as working hours, division of work, and the revision of the group health insurance plan (R. 195). He asserted that "the great question" before the employees was whether they "want now to give up a wholesome, harmonious relationship" of 40 years for "a way of life that anyone can see * * * [has caused] loss of time, knocked heads, homes damaged, members of families hurt, and a fear of the future brought about by men allowing some group from outside determining their future" (R. 214; 195). Houston reiterated management's interest in resolving grievances, and then exhorted (R. 212, n. 10, 214; 196):

> May the recent happenings show to the management and you men that closer open discussions started by any of the team will bring out into the open, for investigation and correction

any problems that might work to the disadvantage of the company's or employees' welfare.

Houston went on to remind the men and their wives in detail of the Company's past generosity, to emphasize the Union's inability to raise wages, to threaten the loss of perquisites such as the existing training opportunities leading to "better jobs and greater earnings," and to warn of further deprivations should the Union be selected (R. 214-216; 196-205).[6]

3. On May 8, the day after Houston's speech, the Union lost the Board election, 377 votes to 362 (R. 207, n. 2; 148). The Union filed objections asserting that the Company's conduct had unlawfully affected the result of the election (R. 7). During June and July of 1963, while the objections were pending, the Company took the following action: On June 20, for the first time in several years, the Company announced a bonus; all employees were to receive a five percent bonus on their earnings beginning July 1, payable at six-month intervals beginning in January

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[6] In relevant part, Houston stated:

> We know, and we understand the outsiders have admitted they cannot do anything in the way of increasing your earnings.
>
> One thing they might do if you vote for a union is to assure that through continual harassment your earnings may be reduced unnecessarily. * * *
>
> If you men vote for a union you never again will see a bulletin by the company telling you of a new plan such as the birthday bonus, additional compensation by %, Trust Fund or Pension Plan. * * *
>
> We will be forced to play a waiting game. * * *
>
> Under a union collective bargaining starts fresh. What might that mean. [R. 214, 215; 201, 204, 205.]

1964 (R. 217; 12). And, in late July, the Company announced a plant-wide increase in vacation pay.[7]

B. The Board's Decisions and Order

The Board concluded that the Company had restrained and coerced its employees, in violation of Section 8(a)(1) of the Act, by the calculated timing of its announcement of increased insurance benefits, by questioning employees concerning their grievances and adjusting grievances, by granting employees extraordinary overtime, by threatening economic reprisals should the Union win the election, and by promising further benefits if the employees repudiated the Union—all in the period of the two and a half weeks immediately preceding the Board election (R. 210; 212, 213-214, 216). The Board also determined that the Company had further violated Section 8(a)(1) by granting a bonus and increased vacation pay while objections to the election were pending (R. 218). Finally, the Board found that the Union had valid authorizations from a majority of the employees prior to the Company's pre-election unfair labor practices, and

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[7] The Company determines vacation pay by multiplying each employee's average hourly rate by a standard number of hours fixed by the Company as the workweek for the full work force; this figure is then multiplied by the number of vacation weeks to which the employee is entitled (R. 217; 40, 81-82). In 1963, the Company changed to a standard workweek of 45 hours, in contrast to the 40 hours used in 1962 and the preceding four years (R. 217; 81, 82, 40, 43). This change was made even though Company records show that fewer, not more, hours were worked in each month during the first half of 1963 than in the same months during 1962 (R. 218, n. 18; 154-157).

that those unlawful practices had dissipated the Union's majority support and had also destroyed "the conditions for a fair election in which the Union could have demonstrated that majority" (R. 265-267).[8] Accordingly, the Board ordered the Company to cease and desist from the unfair labor practices found, and to bargain with the Union upon request (R. 267-268, 219-221B).[9]

C. The Decision of the Court of Appeals

The court of appeals sustained the Board's findings of fact, concluding that they "represent[ed] reasonable interpretations of the evidence" (Pet. App. 2-3). The court enforced the Board's order in full, stating (Pet. App. 6):

> In the present case the Board's findings establish not only a violation of Section 8(a)(1), but also an interference with the bargaining agent designated by a majority. We are unable to say that

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[8] In its initial Decision and Order, the Board, upon finding the violations of Section 8(a)(1) described above, issued a cease and desist order, set aside the election, and directed that a new election be held (R. 219-221). Thereafter, upon motion by the Union asking the Board to reconsider its direction of a new election, the Board remanded the case for a further hearing to permit a showing—as the Union had offered to prove in the original hearing (R. 259, n. 2; 58-59)—that the Union had achieved majority status prior to the Company's unfair labor practices, and to consider further the question of the appropriate remedy (R. 130-132).

[9] The Board also sustained the objections to the election, and, since it determined that a bargaining order was appropriate rather than a new election, it dismissed the election petition (R. 267-268, 266, n. 12).

it was arbitrary for the Board to conclude that a reasonable vindication of the Act and its purposes is best served by returning these parties to the *status quo ante* and compelling the Company to commence bargaining.

ARGUMENT

The decision of the court of appeals is correct and there is no conflict of decisions. There is thus no occasion for further review.

1. Contrary to petitioner Company's contention (Pet. 8-9), the holding of the court below, in enforcing the Board's bargaining order in the circumstances of this case, was clearly proper and presents no novel issues. As petitioner concedes (Pet. 8), *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, holds that, where the union had the support of a majority of the employees prior to the employer's unfair labor practices and those unfair labor practices (in that case an unlawful refusal to bargain) dissipated that majority, the Board is empowered to order the employer to bargain with the union without first requiring it to win a Board election. And the courts of appeals have uniformly agreed that the same principle sustains the Board's power to issue a bargaining order where the union which originally enjoyed majority support went to a Board election, lost that election, and the election was then set aside by the Board because of the employer's unfair labor practices.[10]

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[10] See *Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128, 138-139 (C.A. 8) certiorari denied, 382 U.S. 904; *Irving Air Chute Co.* v. *National Labor Relations Board*, 350

Nor are such precedents inapposite because here the Union's majority was dispelled by employer conduct which constituted restraint and coercion within the meaning of Section 8(a)(1) of the Act, but did not involve an unlawful refusal to bargain within the meaning of Section 8(a)(5). It is well settled that a bargaining order may be equally as appropriate to remedy violations of Sections 8(a)(1) or 8(a)(3),[11] as violations of 8(a)(5) itself, where by those violations the employer has sought to avoid the bargaining obligation that otherwise would have arisen.[12]

F. 2d 176, 182 (C.A. 2); *International Union of Electrical Workers* v. *National Labor Relations Board*, 352 F. 2d 361, 363 (C.A. D.C.) certiorari denied, *sub nom. SNC Manufacturing Co.* v. *National Labor Relations Board*, 382 U.S. 902; *National Labor Relations Board* v. *Frank C. Varney Co.*, 359 F. 2d 774, 775-776 (C.A. 3); *Master Transmission Rebuilding Corp.* v. *National Labor Relations Board*, 373 F. 2d 402 (C.A. 9); *National Labor Relations Board* v. *Southbridge Sheet Metal Works*, No. 6875 (C.A. 1), decided July 17, 1967, 65 LRRM 2916, 2917-2918. Those decisions approve the Board policy enunicated in *Bernel Foam Products Co.*, 146 NLRB 1277, that, where an employer's unfair labor practices or other preelection misconduct require the Board to set aside an election, the Board will not regard the union's participation in the election as a waiver of its right to file an unfair labor practice charge relating to the employer's prior unlawful refusal to bargain.

[11] Section 8(a)(3) (29 U.S.C. 158(a)(3)), a companion provision to 8(a)(1) and 8(a)(5), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

[12] *D.H. Holmes Co.* v. *National Labor Relations Board*, 179 F. 2d 876, 879-880 (C.A. 5) (Section 8(a)(1)); *National Labor Relations Board* v. *Caldarera*, 209 F. 2d 265, 268-269

National Labor Relations Board v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2), referred to by petitioner (Pet. 9-10, 11), is not to the contrary. The Second Circuit there did not reject the principle that a bargaining order could be an appropriate remedy for a Section 8(a)(1) violation. Rather, its refusal to enforce such an order in *Flomatic* rested on the special circumstances of that case, *i.e.*, that there was only "a borderline, unaggravated § 8(a)(1) violation, standing alone" (347 F. 2d at 79), or, as the Second Circuit has subsequently termed it, "only a minimal Section 8(a)(1) violation." *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 182 (C.A. 2); *National Labor Relations Board* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 687 (C.A. 2).[13] Here,

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(C.A. 8) (8(a)(1) and (3)); *Summit Mining Corp.* v. *National Labor Relations Board*, 260 F. 2d 894, 900 (C.A. 3) (8(a)(3) and (1)); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1) (8(a)(3)); *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575, 591-592 (C.A. 3), certiorari denied, 364 U.S. 933 (8(a)(3) and (1)); *Local No. 152, Teamsters* v. *National Labor Relations Board*, 343 F. 2d 307, 309 (C.A. D.C.) (8(a)(1) and (3)); *National Labor Relations Board* v. *Delight Bakery, Inc.*, 353 F. 2d 344, 346-347 (C.A. 6) (8(a)(1)); *International Union, United Automobile Workers* v. *National Labor Relations Board*, 363 F. 2d 702, 707, n. 7 (C.A. D.C.), certiorari denied, *sub nom. Aero Corp.* v. *National Labor Relations Board*, 385 U.S. 973 (8(a)(1)); *Wausau Steel Corp.* v. *National Labor Relations Board*, 377 F. 2d 369, 373-374 (C.A. 7) (8(a)(1)); *J.C. Penney Co.* v. *National Labor Relations Board*, No. 8874 (C.A. 10), decided August 29, 1967, 66 LRRM 2069, 2074-2075 (8(a)(1)).

[13] In *Flomatic*, the only violation consisted of the distribution of a letter, just prior to the election, in which the employer promised benefits and invited his employees to deal

on the other hand, the Company engaged in both a series of unlawful acts during the several weeks just prior to the May 1963 election, and also in further violations while objections to that election were pending—thereby demonstrating an intention not only to undermine the first election but any other one that might be held at a later time. Nothing in *Flomatic* suggests that the Second Circuit would refuse to sustain a bargaining order in the instant circumstances.[14]

2. There is likewise no substance to petitioner's contention that the Union's majority status was not properly established.

a. Contrary to petitioner's assertion that the authorization card provided by the Union was "misleading on [its] face" (Pet. 6), the card, titled "AUTHORIZATION", is a clear and "wholly unambiguous"[15] authorization of the Union "to act for me [the sign-

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with him directly rather than through a union—what the court termed "a somewhat overstated reply to the union's charge." 347 F. 2d at 76-77, 78.

[14] Nor is *Wausau Steel Corp.* v. *National Labor Relations Board*, 377 F. 2d 369 (C.A. 7), also cited by petitioner (Pet. 10), inconsistent with *Flomatic*. In *Wausau*, the court found that the employer had engaged in an extensive course of conduct which violated Section 8(a)(1), *i.e.*, promises of benefit, threats of reprisal, and coercive interrogation (see 377 F. 2d at 371-372).

[15] The language is that of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 920, referring to an authorization card almost identical to the one involved here (compare 351 F. 2d at 918, with Pet. 6-7).

er] as a collective bargaining agency * * * and to enter into contracts with my employer covering [wages, hours, and other conditions of employment], including contracts which may require the continuance of my membership in the [Union] as a condition of my continued employment" (Pet. App. 6-7). Indeed, the card's opening phrase, in which the signer requests and accepts membership in the Union, would alone suffice to designate that organization a bargaining agent for the signing employee. Cf. *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. 2d 404 (C.A.D.C.), certiorari denied, 317 U.S. 659.[16]

b. There is also no merit to petitioner's claim that the cards were not properly authenticated (Pet. 14-15). The facts relating to this issue may be summarized as follows:

Early in February of 1965, attorneys for the Board's General Counsel and for the Company met to discuss the possibilities of shortening the supplemental hearing to be held on the question of the Union's majority (see note 8, *supra*). Counsel for the Company asked that the General Counsel turn over the authorization cards to him so that his handwriting expert might

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[16] The card is thus not a "dual purpose card" of the kind discussed at Pet. 13-14, *i.e.*, a card that both calls for an election and authorizes representation.

Similarly, no issue is raised by petitioner's allegations that the cards were "tainted by the atmosphere in which they were solicited" (Pet. 6), and that they were "given upon the representation that there will be a secret ballot" (Pet. 15). These are but bare allegations for which petitioner does not, and could not, cite support in the record.

compare them with documents in the Company's possession. The attorneys agreed to this procedure, and further that counsel for the Company would then (as he later put it) "advise [the General Counsel] as to the signatures they [the Company] were questioning," but would not stipulate as to any cards going into evidence (Tr. 67-68). Accordingly, on February 12, the General Counsel delivered to the Company approximately 470 cards, including every card subsequently offered in evidence. Counsel for the Company returned the cards on March 9, just a week before the hearing was to open. He also presented to the General Counsel a list of 24 cards questioned as to authenticity of signature. And he informed the General Counsel that he questioned some 127 other cards on other grounds, such as date and the department in which the signer worked. But he did not (then or later) identify those 127 cards (R. 260-261; 88-92, 101-102). At the hearing, the General Counsel produced testimony by 19 employees, out of the 24 whose signatures were challenged by the Company, that either they or their wives at their direction had signed the questioned cards—which testimony was credited by the Board (R. 261; 106-115, 117, 119). The General Counsel also introduced uncontradicted testimony showing that all of the cards were collected during the Union's campaign in February and March of 1963 (R. 262; 95, 99, 93, 118, 121, 122, 126); the Board date stamp on the back of 414 of the cards corroborates that this clear majority was secured well before the Company's first unfair labor practice; and

450 of the cards bear dates within the relevant time period.[17]

On these facts, the Board was warranted in finding that the more than 450 cards had been properly authenticated. As the Board pointed out, while "some evidence of its genuineness" is necessary before a document may be admitted, that evidence may take the form of an extra-judicial admission (R. 263). The latter "has always been regarded as sufficient; the only question could be whether the party's words or conduct under the circumstances amounted to an admission." 7 Wigmore, *Evidence* § 2132 (3d ed. 1940). The pertinent circumstances here were the Company's opportunity to compare all of the Union's cards against the Company's own records and its agreement to "advise [the General Counsel] as to the signatures [it was] questioning." Thus, the Company's identification of the 24 signatures it questioned after making that comparison plainly carried an implied admission that all of the others were genuine, the Company's refusal to so stipulate notwithstanding. Cf. *National Labor Relations Board* v. *Hunter Engineering Co.*, 215 F. 2d 916, 922-923 (C.A. 8). The cards were likewise timely, for the date of signing "may be presumed from the purporting date of the document" (9 Wigmore, *Evidence* § 2520(b) (3d ed. 1940)), and in any case, as stated

[17] As to the five valid cards remaining, three do not show the year and two are dated after conclusion of the campaign, but all five were in the group of cards received and date-stamped by the Board Regional Office on March 8, 1963 (R. 262, n. 5; see R. 134-144).

above, they were shown to have been collected within the relevant time period.[18]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board.

OCTOBER 1967.

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[18] Since the procedure of a pre-hearing check of the cards was adopted by agreement between the Company's counsel and the General Counsel, there is clearly no basis for petitioner's assertion (Pet. 15) that the procedure utilized here gives the Board "the unilateral right to demand that employers admit or deny authenticity," on pain of being deemed to have admitted it if they simply stand silent.

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